Dissenting Views to H.R. 7

We dissent from the provisions in H.R. 7 which fall within the Committee on the Judiciary's jurisdiction (Sec. 201 and 104).

We strongly believe that religious organizations can and should play an important and positive role in meeting our nation's social welfare needs. However, we cannot support legislation which seeks to enlarge the role of religious institutions by sanctioning government-funded discrimination and by breaking down the historic separation between church and state. This is why the legislation is opposed by a broad range of groups, including civil rights organizations (the Leadership Conference on Civil Rights, the NAACP, the NAACP Legal Defense Fund, the ACLU, Americans United for Separation of Church and State, the National Abortion Rights Action League, People for the American Way, the National Gay and Lesbian Task Force, the National Organization for Women), religious organizations (the Interfaith Alliance, the Baptist Joint Committee, the American Jewish Committee, the Union of American Hebrew Congregations, the Unitarian Universalist Association of Congregations), education organizations (the National Education Association, the American Federation of Teachers), and organized labor (AFSCME, Service Employees International Union).[1]

Summary of Legislation and Democratic Concerns

Section 201 of H.R. 7 adds a new Section 1994A to Title 42 of the U.S. Code designed to expand previously enacted "charitable choice" laws[2] to include eight new categories of federal grant programs (relating to, among other things, juvenile justice, crime, housing, job training, domestic violence, hunger relief, seniors services, and education). Under the bill, the federal government – or a state or local government using covered federal funds – is prohibited from discriminating in the award of grants against religious organizations on account of their religious

[1]Letter from the Coalition Against Religious Discrimination to members of the House of Representatives (June 25, 2001) (listing 51 national organizations that oppose charitable choice) (on file with the House Judiciary Committee).

[2]The Personal Work and Work Opportunity Reconciliation Act of 1996, P.L.104-193, Title I §104 (Aug. 22, 1996), 110 Stat. 2161, 42 U.S.C. 604a (hereinafter, the "Welfare Reform Act"); The Community Services Grant Program, P.L. 105-285, Title II, §201 (Oct. 27, 1998), 112 Stat. 2749, 42 U.S.C. 9920; The Substance Abuse and Mental Health Services Act, P.L. 106-310, 42 U.S.C. § 300x-65; and The Community Renewal Tax Relief Act of 2000 (H.R. 5662 included in consolidated Appropriations Act of 2001, P.L. 106-554 (Dec. 12, 2000), 114 Stat. 2763.

* - Denotes revisions made subsequent to filing the Committee Report.

character.[3] This right is enforceable by a lawsuit brought by a religious organization against the local, state and/or federal government.[4]

The bill extends the current exemption in the civil rights law (section 702 of the Civil Rights Act of 1964) which permits religious organizations to discriminate in employment on account of religion to allow religious organizations to use public funds to discriminate on the basis of religion.[5] Because the current section 702 exemption permits religious organizations to discriminate in employment on the basis of so-called "tenets and teachings," the bill therefore would permit religious groups to use taxpayer money to discriminate not just on account of a prospective employee's religion, but upon his or her failure to adhere to religious doctrine (*e.g.*, being pregnant and unmarried, being gay or lesbian).[6] Significantly, this ability to discriminate would supercede any federal, state, or local civil rights law or contracting requirement or condition to the contrary.[7]

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[3]Manager's amendment to H.R. 7, Section 201 adding proposed Section 1994A(c)(1)(B), 107th Cong. (2001).

[4]Manager's amendment to H.R. 7, Section 201 adding proposed Section 1994A(n), 107th Cong. (2001).

[5]Manager's amendment to H.R. 7, Section 201 adding proposed Section 1994A(e), 107th Cong. (2001).

[6]David M. Ackerman, *Scope of the Title VII Exemption Contained in Title II of H.R. 7, as Approved by the House Judiciary Committee*, CRS Report prepared for Rep. John Conyers, Jr. (July 3, 2001), at 2, 3 (on file with House Judiciary Committee).

[7]Several features of H.R. 7 make it clear that the legislation will supercede state and local laws:

First, subsection (d) specifies that a religious organization receiving federal funds "shall have the right to retain its autonomy from Federal, State, and local governments, including such organization's control over the definition, development, practice and expression of its religious beliefs." The same subsection operates to protect the organization's internal governance against any governmental interference. Under the Constitution's Supremacy Clause, this subsection would take precedence over a state law, for example, protecting gays and lesbians, unmarried, or pregnant individuals from employment discrimination.

Second, subsection (e) specifies that a provision in a program receiving federal funds under a covered program – which would include state programs that receive and distribute federal funds – that is "inconsistent with or would diminish the exercise of [a religious] organization's autonomy" as recognized in section 702 of the Civil Rights Act or the bill generally "shall have no effect." This broad language would serve to negate, for example, a condition in a state grant program specifying that entities that received funds would need to agree not to discriminate on the bases of specified protective categories in employment.

In an effort to prevent the legislation from being unconstitutional under the Establishment Clause, the bill includes several purported first amendment safeguards. Thus, the legislation states that if a beneficiary objects to the religious character of a provider, the governmental entity is required to provide an alternative service that is unobjectionable on religious grounds.[8] The bill also specifies that religious organizations receiving grants may not discriminate against beneficiaries on the basis of their religion, and that religious organizations receiving indirect assistance (*e.g.*, a voucher) may not deny admission on the basis of religion.[9] In addition, the legislation states that government funds may not be used for sectarian instruction, worship, or proselytization, and that if the religious organization offers such activity, it is to be "voluntary" and "offered separate" from the government funded program.[10]

Enforcement of these strictures is largely left to the religious organization. Thus, the religious organization is expected to file a certificate that it is aware of and will comply with the limitations on the use of its funds and the voluntary and separate requirement.[11] Religious organizations are also supposed to conduct an annual "self audit" of their duties under the legislation.[12]

Third, H.R. 7 does not include language from the Welfare Reform Act's charitable choice law specifying that nothing in that law is to "preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations." Given that Congress has previously opted to include language deferring to state law, we can only presume that H.R. 7 was specifically designed to supercede state law.

*Fourth, H.R. 7 does not include language from the Community Renewal Tax Relief Act of 2000 (SAMHSA) preventing preemption of state and local laws. Section 582(e) stated:
"Nothing in this section shall be construed to modify or affect the provisions of any other Federal or State law or regulation that relates to discrimination in employment. A religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 regarding employment practices shall not be affected by its participation in, or receipt of funds from, a designated program."

[8]Manager's amendment to H.R. 7, Section 201 adding proposed Section 1994A(g), 107th Cong. (2001).

[9]*See infra* note 60.

[10]Manager's amendment to H.R. 7, Section 201 adding proposed Section 1994A(j), 107th Cong. (2001).

[11]Manager's amendment to H.R. 7, Section 201 adding proposed Section 1994A(j), 107th Cong. (2001).

[12]The only outside audit permitted under H.R. 7 is with regard to separate financial accounts set up to hold the government funds. Manager's Amendment to H.R. 7 Section 201 adding proposed Section 1994A(i)(2)(A). The legislation also includes an annual authorization of $50 million (from the

Finally, Subsection (l) of the legislation would introduce a major change to our social service programs, granting agencies the discretion to take any or all of the funds in programs covered by the legislation *(e.g.*, for housing, hunger relief and the like) and convert it into an indirect aid program by which beneficiaries could provide "vouchers" to the religious organization, which could in turn receive federal funds. Such "voucherized" programs would be exempt from the requirement that the religious organization not discriminate against beneficiaries on religious grounds as well as the requirement that any sectarian instruction, worship, or proselytization be "voluntary" and "offered separate" from the government funded program.

Section 104 of H.R. 7 is a "tort reform" provision. It supersedes state law to limit businesses from civil liability for donated equipment, the provision of their facilities, and the provision of their motor vehicles or aircrafts to nonprofit organizations.[13]

We cannot support the Judiciary-reported provisions of the legislation because in an effort to increase the role of religion in meeting society's needs, the legislation sacrifices two of our nation's most fundamental principles – equal protection and the separation of church and state.

In terms of equal protection, the legislation runs counter to the long held principle that it is unacceptable for any group or entity to discriminate with taxpayer funds. Given that the bill's proponents claim that government funds will only be used for wholly secular purposes, we cannot understand why it is necessary to sanction discrimination in employment on account of religion. Nor can we understand why the bill permits religious organizations to discriminate on the basis of "tenets and teachings," which sweep in employment discrimination against gays and lesbians, unmarried pregnant women, women who have had an abortion, and persons who advocate reproductive choice. Equally disturbing is the fact that the bill sets aside not only federal civil rights protections, but also state and local laws and contracting requirements designed to protect against discriminating in employment with government funds.

With regard to the separation of church and state, we are concerned that the supposed "safeguards" included in the manager's amendment include several loopholes and are unlikely as a practical matter to insure that the Establishment Clause is respected. At the same time, the legislation is

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Office of Justice Programs and the COPS on the Beat program) to give small religious organizations training and technical assistance in seeking grants. Manager's Amendment to H.R. 7, Section 201 adding proposed Section 1994A(o)(1).

[13]Section 104 would create an extremely high standard to prove corporate negligence, gross negligence or intentional misconduct. This means that unless the corporation knew at the time of donation that the equipment, motor vehicle or aircraft or facility would likely injure or kill the user, the corporation could not be held liable. As a result, a corporate donor would be virtually immune from responsibility for injuries it may have caused.

likely to serve to entangle government and religion, and in so doing, diminish the respect of our citizens for each. Recent press reports indicate that such inappropriate entanglement has already begun.[14]

We also believe it is somewhat inconsistent for the Administration to be advocating this legislation as a tool to respond to poverty and other social ills, when H.R. 7 does not authorize a single dollar in additional funds for any of the social service programs covered by the bill. Even more problematic is that cuts in the Administration's budget assure that even if H.R. 7 is enacted, it will only serve to pit religious organizations, secular non-profits, and government agencies against each other for an ever declining share of federal funds. Finally, in terms of the state liability law limits included in the bill, we fear that unilateral changes of this nature undermine federalism and expose the most vulnerable members of society to greater risk of accident and harm from faulty equipment and dangerous facilities.

We support the notion that government can and should seek increased involvement of non-profits – including religious organizations – in meeting our nation's social welfare needs. At present, tax preferences provided to non-profits by the federal government total an estimated $25.8 billion per year.[15] Many of us are supportive of efforts to extend these tax benefits even further (although such extension was not sufficiently important for the Administration to include in their recently passed $1.35 trillion tax legislation).

In addition, we would note that the federal government already provides billions upon billions of dollars of direct annual support to non-profit organizations, including religiously affiliated organizations who have set up 501(c)(3) entities and operate within constitutional boundaries not required by H.R. 7. President Bush admitted as much in a recent speech when he acknowledged that under current law, federal funds already go to child care and Head Start programs housed in churches and pay for health care in Catholic, Baptist, or other denominational hospitals. Illustrative of this success are Catholic Charities USA – which receives $600 million per year in government funds[16] – and is able to offer services through more than 1400 agencies, institutions, and organizations,[17] and Lutheran Services in America, which serves over 3 million persons annually in over 3,000 communities.[18]

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[14]*See* discussion of alleged *quid pro quo* between Bush Administration and Salvation Army, *supra*. p. 13.

[15]Staff of Joint Economic Committee, 106th Cong., Tax Expenditures: A Review and Analysis 3 (Comm. Print 1999).

[16]Catholic Charities USA, http://www.catholiccharitiesusa.org/who/stats.html.

[17]Catholic Charities USA, http://www.catholiccharitiesusa.org/who/history.html.

[18]Lutheran Services in America, http://www.lutheranservices.org/whoweare.htm.

In fact, when President Bush visited Habitat for Humanity and proclaimed that it was an example of the need for charitable choice, the president and founder of Habitat for Humanity said he did not need new laws, and he insisted that he was "thriving" under present laws. Contrary to President Bush's recent assertions, we are unaware of anyone who opposes these organizations operating public programs and providing services. They are funded like all other private organizations are funded: they are prohibited from using taxpayer money to advance their religious beliefs and they are subject to the civil rights laws. Any program which can be funded under H.R. 7, as reported, can be funded now, except that under this bill the sponsoring organizations can refuse to comply with the civil rights laws.

Charitable Choice represents a false promise to struggling communities who desperately need resources. While it is described as a plan to help faith-based organizations receive and administer government grants, Charitable choice in practice only represents an assault on our civil rights laws. It is also more clear than ever with the recent reports from the Washington Post that a sweeping roll back in civil rights protections at all levels is at the core of charitable choice.

Certainly, government can do more in collaboration with religious and non-profit organizations. We can expend funds to help religiously affiliated groups understand and comply with the law and seek federal funding.[19] Also, we can encourage religious leaders to serve on government task forces fighting social ills, and insure that government offices provide appropriate information on social services offered by houses of worship. Unfortunately, H.R. 7 does not focus on bipartisan common sense initiatives which would move our nation forward. Instead it divides us along lines of religion, sexual status, marital status, and race. For these and the reasons set forth herein, we dissent from the Judiciary-reported provisions in H.R. 7.

I. *H.R. 7 Allows Religious Organizations Receiving Taxpayer Funds to Discriminate in Employment on Account of Religion*

Our principal objection to the legislation is that it permits taxpayer funds to be used to discriminate in employment. This violates one of the most fundamental principles of civil rights, first enunciated by President Franklin D. Roosevelt by Executive Order 60 years ago that the government should not fund employers, religious or otherwise, who engaged in discrimination on account of race, religion, color or national origin.[20]

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[19]"In this regard, President Bush did request that Congress place $700 million in a "Compassion Capital Fund" to support charitable organizations providing social services, claiming it was a "noble mission" during his February 27, 2001 Address to a Joint Session of Congress. Yet, the President's budget proposal only included $89 million for the fund. Even this reduced request was ignored in the budget resolution adopted by the Majority.

[20]Exec. Order 8802 (June 25, 1941). This fundamental principle of non-discrimination subsequently was reflected in other executive orders by every future President.

We are perplexed why the Majority has so fervently sought to extend the right to discriminate on religious grounds given that they have separately argued that the funds referenced under the bill will be used for wholly secular purposes. They cannot have it both ways – either the federal funds will be used for religious purposes, in which case there may be a justification for tolerating religious discrimination (but would render the legislation constitutionally suspect); or the funds will be used in a non-sectarian manner, in which case there is no reason to discriminate on the basis of religion. As Democratic Members made clear at the markup, cooking soup and giving it to the poor can be done equally well by persons of all religious beliefs.

Even more problematic is the bill's sanctioning of discrimination based on religious "tenets and teachings." Under this doctrine, religious institutions are permitted to discriminate in employment against anyone who disagrees with or conducts themselves in a manner at odds with any form of the religious institutions' doctrine or practices.[21] Thus, under the bill, an organization could use taxpayer funds to discriminate against gays and lesbians,[22] against divorced persons,[23] against unmarried pregnant women,[24] against women who have had an abortion, persons who use birth control, persons who favor reproductive rights,[25] or persons involved in interracial dating or marriage.[26] Again, while there may be some conceivable justification for this type of discrimination in the context of a religious organization employing persons associated with its religious function, there is no legitimate justification for extending such discrimination with regard to government-funded secular services for the poor and needy, as the bill does.

Notwithstanding the series of changes made to the employment discrimination language pursuant to the manager's amendment, there is no question that after all is said and done, the bill will sanction this form of tenets and teachings discrimination. In a Memorandum issued subsequent to the Committee Markup, the Congressional Research Service stated that the bill would authorize this type of discrimination, noting that "[j]udicial decisions have held the [religious] exemption to apply to

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[21] *See infra* note 6.

[22]*See Hall v. Baptist Memorial Healthcare Corp.*, 215 F. 3d 618 (6th Cir. 2000).

[23]*See Little v. Wuerl*, 929 F. 2d 944 (3rd Cir. 1991).

[24]*See Cline v. Catholic Diocese of Toledo*, 206 F. 3d 651 (6th Cir. 2000).

[25]*See Maguire v. Marquette University*, 814 F. 2d 1213 (7th Cir. 1987).

[26]NAACP Legal Defense Fund Information Sheet. The report states, "under the language of [charitable choice], Bob Jones University could become a provider of services under one or more federal programs and require that employees...subscribe to its religious tenets and not engage in interracial dating...". (On file with the House Judiciary Committee).

discrimination based on tenets, teachings, beliefs, behavior and practices."[27] The CRS Memorandum then goes on to cite a long list of cases where persons were discriminated against by religious organizations because, among other things, they failed to have their first marriage properly annulled, they were gay, they had extramarital sex, they supported reproductive choice, or they were actively involved in a church which had gay and lesbian members.[28]

We would further note that the protections against discrimination in H.R. 7 on the basis of race are not complete. The application of the 'ministerial exception' to any publicly funded positions also should be given serious consideration and review. There is a question as to how enforceable Title VII's protections against racial discrimination in employment will be once publicly funded religious discrimination is allowed. Given that the eleven o'clock hour is still one of the most segregated hours in America, an all white religious organization could simply tell otherwise qualified minority candidates of the same religion, we only hire those that belong to our church.

The non-discrimination language included in the bill not only sets aside federal civil rights laws, it goes so far as to obviate state and local laws and federal, state, and local contracting requirements intended to safeguard against religious discrimination in employment. Thus if a state had decided that as a matter of public policy it did not want to tolerate religious discrimination by a non-profit engaged in secular affairs, or that religious organizations who utilized state provided funds should not be permitted to discriminate, or even that they should be able to discriminate on account of religion, but not on account of "tenets and teachings," all of these laws and contracting requirements would be set aside under H.R. 7. To us, this turns the principle of federalism and respect for state prerogatives on its head.

The consequences of H.R. 7's superceding state civil rights protections are quite extreme. Under the legislation, a national religious organization could choose to accept a single federal grant and attempt to use that as a shield to avoid laws protecting gay and lesbian employment rights in all 50 states. For example, Maryland's law on domestic partner benefits could be set aside under H.R. 7. This means that even if the Bush Administration abandons its proposal to issue an administrative ruling setting such state and local civil rights protections aside,[29] opponents of such protections would be able to accomplish even greater immunity from such laws under H.R. 7.

At its core, the Majority and supporters of H.R. 7 challenge the fundamental notion of "protected class" as currently recognized by our civil rights laws. The Majority has suggested that organizations should be able to discriminate in employment to select employees who share their vision

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[27] *See infra* note 6.

[28] *Id.*

[29] Dana Milbank, *Bush Drops Rule On Hiring of Gays; Democrats: 'Faith Based' Initiative at Risk*, WASHINGTON POST, July 11, 2001, at A10.

and philosophy. Under current civil rights laws, employers can discriminate against a person based on their views on the environment, abortion, gun control, or just about any other basis. Employers can also select staff based on their commitment to serve the poor or whether they think prospective applicants have compassion to help others kick drugs. But because of a sorry history of discrimination against certain Americans, we have had to establish "protected classes" and under present law employers, including religious organizations who sponsor federal programs, cannot discriminate against an individual based on race, sex, national origin, or religion.

It is for these reasons that civil rights groups such as the NAACP, the NAACP Legal Defense Fund and the Leadership Conference on Civil Rights are so strongly opposed to the bill. They have nothing against religion, but they do believe we do nothing to help poor and needy individuals if we tolerate more discrimination. Thus, on July 8, 2001, Julian Bond, the Chairman of the NAACP, the nation's oldest and largest civil rights organization declared that "[t]he Administration's faith-based plan threatens to erase sixty years of civil rights protections."[30] The NAACP Legal Defense Fund has written that the religious discrimination provisions in charitable choice legislation are "wholly inconsistent with longstanding principle that federal moneys should not be used to discriminate in any form."[31] Wade Henderson, the Executive Director of the Leadership Conference on Civil Rights, the nation's most broadly based civil rights organization, has testified that "charitable choice threatens to erode [the fundamental principle of non-discrimination] by allowing federal funds to go to persons who discriminate in employment based on religion."[32]

Given the obvious and real nature of our concerns regarding the bill's sanctioning of employment discrimination, we are not surprised that the legislation's supporters have resorted to a series of myths to justify H.R. 7. Of course, upon close scrutiny, none of these myths can be sustained:

Myth 1 – Religious discrimination is needed so that small religious organizations can share religious employees between non-secular and secular functions

This claim suffers from several legal deficiencies. As a threshold matter, Title VII only applies to organizations which employ 15 or more persons.[33] This means that extension of the Section 702 exemption is not needed to permit small religious organizations to be able to hire persons of their own

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[30]Statement by Julian Bond, Chairman, NAACP at NAACP National Convention, July 8, 2001, at 16. (On file with House Judiciary Committee).

[31]*See infra* note 26.

[32]Statement by Wade Henderson, Executive Director, Leadership Conference on Civil Rights before the Committee on the Judiciary, U.S. Senate, 107th Cong. (June 6, 2001), at 3.

[33]*See infra* note 6.

religion. Second, the courts have said that under the First Amendment Free Exercise Clause, religious institutions are entitled to a "ministerial exception" permitting them to bypass Title VII's prohibitions on discrimination with respect to race, gender, and national origin to hire their clergy and spiritual leaders.[34] Again, extending the reach of the section 702 employment discrimination exemption will do little to help religious groups share the costs of their clergy between their religious and secular accounts.

The 15 person threshold requirement and ministerial exception should therefore cover most of the needs of small religious organizations. To the extent there is any gap in coverage, we note that the Majority never proposed a tightening amendment Instead, H.R. 7 appears to use the issue of small religious organization needs as an excuse to justify wide scale relief from our anti-discrimination laws.

Myth 2 – We should extend the religious civil rights employment exemption because it is based on previous charitable choice laws signed by President Clinton and which have been implemented without controversy

This contention also fails for a variety of reasons. Most obvious is the notion that a previous act of Congress cannot and should not bind a future Congress, particularly with regard to a dubious legal principle. Beyond that it is important to note that there are numerous, major differences between H.R. 7 and other charitable choice laws. Among other things, H.R. 7 covers a far broader range of programs and includes a far larger pot of funds than previous charitable choice laws.[35] H.R. 7 also includes a variety of different safeguards and permits a broader range of religious discrimination with respect to beneficiaries than previous charitable choice laws.[36]

In addition, the legislative history of the previous charitable choice laws makes clear that these laws were never carefully considered or debated. We begin with the fact that until this Congress there has never been a hearing on charitable choice legislation in the House or the Senate. The Judiciary Committee – which has jurisdiction over the issue – has never been involved in any previous charitable choice legislation. Moreover, when charitable choice has been added to legislation in the past, it has

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[34] *Id.*

[35]Based on the Bush Budget, the funds covered by the previous charitable choice laws total approximately $23.7* billion ($3 billion for SAMHSA; $16 billion for TANF; $4.7* billion for Community Development Block Grants). By contrast, the social service programs covered by H.R. 7 total at least $75.2* billion ($.3 billion for juvenile justice; $6.5 billion for crime control and domestic violence; $28 billion for housing; $7 billion for job training; $1 billion for seniors services; $31* billion for hunger; $1.4 billion for GED and after school programs).

[36]*See* notes 10, 60, 61 and accompanying text.

often been done at the very end of the process, with no opportunity for Democratic input or amendment.[37]

It is also misleading to contend that prior charitable choice laws have been enacted with the endorsement of President Clinton. To the contrary, shortly after the Welfare Reform Act was enacted, the Clinton Administration proposed amendments to clarify the charitable choice provisions to ensure that religiously affiliated organizations could not participate if they were "pervasively sectarian."[38] Additionally, in connection with the signing of the Community Services Block Grant law in 1998 and the Substance Abuse Mental Services Act in 2000, President Clinton specifically noted that the Department of Justice believed charitable choice was potentially unconstitutional, and as a result construed the law as forbidding the funding of pervasively sectarian organizations.[39]

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[37]The charitable choice provision of the Welfare Reform Act was offered in conference. It was not included in the House bill. Democrats never had a chance to strike the provision because conferees were never given an opportunity to offer amendments. Charitable choice was also added to the re-authorization of Community Services Block Grant (CSBG) in the 105th Congress as part of a larger Human Services reauthorization that included Head Start, CSBG, and Low Income Heating Energy Assistance Program (LIHEAP). It was the last item to be considered by the conferees due to the controversy. This marked the first time that Charitable Choice was debated on the House floor. The debate occurred at 1 a.m. Charitable Choice language was signed into law twice in the 106th Congress on the SAMHSA programs- as part of H.R. 4365, the Children's Health Act of 2000, P.L. 106-310, and as part of the omnibus end of year spending bill, H.R. 4577, P.L. 106-554. The language in H.R. 4577 replaced the language signed into law pursuant to H.R. 4365. In both cases, the charitable choice provisions were added without any opportunity to offer amendments.

[38]The Clinton Administration filed the following comments in connection with the proposed amendments: "We recommend amending sec. 104 to clarify that it does not compel or allow States to provide TANF benefits through pervasively sectarian organizations, either directly or through vouchers redeemable with these organizations....[P]rovisions of sec. 104 and its legislative history could be read inconsistent with the constitutional limits." The Administration's amendment to charitable choice failed to be included in a final package of technical amendments to the welfare laws adopted by Congress.

[39]Statement on Signing the Children's Health Act of 2000, 36 Weekly Comp. Pres. Doc. 2504 (October 17, 2000).

> The Department of Justice advises, however, that this provision would be unconstitutional to the extent that it were construed to permit governmental funding of organizations that do not or cannot separate their religious activities from their substance abuse treatment and prevention activities that are supported by SAMHSA aid. Accordingly, I construe the Act as forbidding the funding of such organizations and as permitting Federal, State, and local governments involved in disbursing SAMHSA funds to take into account the structure and operations of a religious organization in

Fourth, current charitable choice laws have barely been implemented, much less analyzed for effectiveness. As of September 2000, forty states had not implemented policies to facilitate the participation of faith-based organizations in charitable choice programs.[40] It is also incorrect to assert, as proponents have done, that prior charitable choice laws have not been subject to legal challenge. Even on the very thin implementation record before us, the legal and constitutional issues raised by charitable choice have already engendered five legal challenges.[41]

Myth 3 – Even outside of charitable choice, various religiously affiliated organizations – such as hospitals and colleges – receive federal funds and regularly discriminate on account of religion

This argument was trotted out several times during our markup. It is somewhat difficult to respond to, because to our knowledge, the Majority has not cited any specific examples. As best we

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> determining whether such an organization is constitutionally and statutorily eligible to receive funding.

President Clinton stated similarly at the 1998 signing of The Community Services Grant Program,

> The Department of Justice advises, however, that the provision that allows religiously affiliated organizations to be providers under CSBG would be unconstitutional if and to the extent it were construed to permit governmental funding of "pervasively sectarian" organizations, as that term has been defined by the courts. Accordingly, I construe the Act as forbidding the funding of pervasively sectarian organizations and as permitting Federal, State, and local governments involved in disbursing CSBG funds to take into account the structure and operations of a religious organization in determining whether such an organization is pervasively sectarian.

[40]Center for Public Justice, "States Fail Charitable Choice Check-Up," Press Release (Oct. 5, 2000).

[41] *See American Jewish Congress and Texas Civil Rights Project v. Bost* 00-A-CA-528-SS (W.D. Tex.)(challenging the Jobs Partnership of Washington County's use of state funding to buy Bibles and give Bible instruction for its welfare-to-work training program); *AJCongress v. Bernik*, No. 317896 (Superior Court, County of San Francisco) (alleging that the California Employment Development Department solicited proposals for $5 million to be earmarked solely for faith-based, but not secular, groups); *Freedom From Religion Foundation v. Thompson* 00-C-O617C (W.D. Wis.) (challenging the use of state funds by Faithworks, an alternative to Alcoholics Anonymous, which encourages belief in a higher power) ; *Lara v. Tarrant County* (Tex. Supreme Court); (challenging a prison chaplain's clear preference for Christianity when approving volunteer teachers for a prison-funded education program) *Pedreira v. Kentucky Baptist Homes*, C/A 3:00CV-210-SKY 2001 (W.D. Ky.)(challenging the firing of a lesbian worker from a state-funded residential child care run by ministries).

can ascertain, the Majority bases their argument on the fact that religious colleges are receiving Pell Grants, and religious hospitals are receiving Medicaid and Medicare payments, at the same time they utilize the section 702 religious exemption. The principal flaw in this contention is that funds received from Pell Grants, Medicare, and Medicaid are indirect. They flow from choices made by beneficiaries, not the government. As a result, to the extent any such religiously affiliated hospital or college is engaged in discrimination, it is not with direct government funds.[42]

If a limited number of religious institutions are receiving federal grants at the same time they are engaging in employment discrimination, it is possible the Majority does not realize the institutions may be doing so in violation of federal law. Certainly, to the extent they are receiving federal funds from grants concerning crime control, housing, job training, domestic violence, and education -- all programs covered by H.R. 7 -- they would not be able to lawfully discriminate on account of religion, as those laws contain specific provisions preventing religious discrimination.[43]

Myth 4 – Using federal funds to discriminate in employment has been upheld by the courts

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[42]*Siegel v. Truett-McConnell College, Inc.* confirms the important distinction between direct and indirect federal aid. The plaintiff in Siegel argued that the college received substantial funds from federal and state sources, such as Pell grants, and therefore was not entitled to the Title VII exemption. The Court ruled that the college was entitled to the Title VII exemption because there was no "direct federal or state subsidy..." and that "[t]he government does not directly pay for any one teacher's salary, including Mr. Siegel's." The court went on to distinguish this case involving indirect benefit (where students choose their college) from a direct benefit (where government provides a direct contract for services)." *Siegel v. Truett-McConnell College*, 13 F. Supp.2d 1335, 1343-45 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995).

[43] *See* the Omnibus Crime Control and Safe Streets Act of 1998, 42 U. S. C. § 3701 *et seq.* (includes a religious nondiscrimination provision at 42 U. S. C. § 3789d(c)); federally assisted housing programs, 42 U. S. C. § 13601 *et seq*. (includes a nondiscrimination provision requiring compliance with all civil rights laws at 42 U. S. C. § 13603(b)(2)); the Workforce Investment Act of 1998, 29 U. S. C. § 2801 *et seq.* (includes a religious nondiscrimination provision at 29 U. S. C. § 2938); domestic violence programs, *see, e.g.*, 42 U. S. C. § 10603 (includes a religious nondiscrimination provision at 42 U. S. C. § 10604(e)); the Child Care Development Block Grant Act of 1990, 42 U. S. C. 9858 *et seq.* (includes a modified religious nondiscrimination provision at 42 U. S. C. § 9858L); the Community Development Block Grant Program of the Housing and Community Development Act of 1974, 42 U. S. C. § 5301 *et seq.* (Includes a nondiscrimination provision requiring compliance with all civil rights laws at 42 U. S. C. § 5304 (b) (2)); and the Job Access and Reverse Commute grant program of the Federal Transit Act of 1998, 49 U. S. C. § 5309 note (includes a religious nondiscrimination provision at 49 U. S. C. § 53329(b)).

This contention rests on the Majority's misreading of the Supreme Court's decision in *Corporation of the Presiding Bishop v. Amos*.[44] That case did uphold the religious exemption set forth in section 702 of the Civil Rights Act, however, it did not involve any use of federal funds. As a matter of fact, the Court went out of its way to distinguish the Title VII exemption from other government programs that might advance religion through financial support or active involvement of the sovereign religious activity. Specifically, the Court held the exemption was "rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of the religious organizations to define and carry out their religious missions."[45] At most, permitting such discrimination was an "accommodation" required by the First Amendment's Free Exercise Clause that minimized the burden on religious organizations to predict which of their activities a secular court might consider religious.[46] Obviously, none of these factors or justifications are present in H.R. 7, which clearly involves the use of federal funds for wholly secular purposes and activities.[47]

Nor is it true, as proponents claim, that Justice Brennan's separate opinion in *Amos* would lend support to H.R. 7's extension of the religious exemption. He wrote, "the potential for coercion caused by such a provision is in serious tension with our commitment to individual freedom of conscience in matters of religious belief."[48]

If anything, the case law on this point supports the contention that it is unconstitutional to use federal funds to engage in discrimination. This was the holding of the district court in *Dodge v. Salvation Army*.[49] That case involved a religious organization – the Salvation Army – which used public funds to exclude members of the Wiccan faith from employment. The court found that such

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[44]Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987).

[45]483 U.S. at 339. As Justice Brennen noted in upholding the section 702 religious exemption for privately funded, religious non-profit activities: "What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs." 483 U.S. at 343.

[46]483 U.S. at 334-35.

[47]Additionally, because H.R. 7 prohibits direct funds being used for sectarian instruction, worship, or proselytization, jobs used with taxpayer money would be beyond the scope of *Amos*. Therefore, none of the entanglement concerns raised by *Amos* would be applicable to an analysis of publicly funded secular positions.

[48]483 U.S. 327, 340-41.

[49]Dodge v. Salvation Army, 1989 WL 53857 (S.D. Miss. 1989).

action was unconstitutional under the Establishment Clause because it treated religious non-profits preferably to non-religious non-profits.[50]

II H.R. 7 Breaks Down the Historic Separation Between Church and State

With regard to the separation between church and state, we are concerned that the safeguards included in the bill may be too weak, and that the bill will pave the way for excessive entanglement between government and religion. We are also concerned that the new voucher authorizations in the bill pose severe constitutional problems. These concerns demonstrate that the bill may be unconstitutional under the Establishment Clause.

Safeguards

We are particularly concerned that the most critical Establishment Clause safeguard included in the legislation – a beneficiary's right to a secular alternative to a faith-based service – is an unfunded and unenforceable mandate. The principal problem is that there is not a single dollar appropriated to meet the requirement, which serves as the lynch pin for H.R. 7, nor has there been any indication from the Administration that they intend to fund this mandate. The Majority's own witness, Professor Douglas Laycock acknowledged that the government must "really [make] available an alternate provider ... you have got to really do that or this program is a fraud."[51] Yet at the same hearing, the Administration's own witness would not commit to fully funding the alternative program. When asked point blank by Rep. Frank whether for the charitable choice program to be fair and justifiable there needs to be a substantively equal secular alternative set of programs, Carl H. Esbeck, Senior Counsel at the Department of Justice responded, "I think in [an] earlier answer I was showing you an example where that was not necessary. So I guess the answer is no."[52]

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[50]The court concluded that such an arrangement was unconstitutional because:

> The benefits received by the Salvation Army were not indirect or incidental. The grants constituted direct financial support in the form of a substantial subsidy, and therefore to allow the Salvation Army to discriminate on the basis of religion, concerning the employment of the Victims' Assistance Coordinator, would violate the Establishment Clause of the First Amendment in that it has a primary effect of advancing religion and creating excessive government entanglement.

[51] *The Charitable Choice Act of 2001: Markup Before the House Judiciary Committee*, H. Doc. No. HJU179.000, (June 28, 2001), p. 214.

[52] *Id.*, at 67.

If the federal government will not find the resources to meet the requirement of a secular alternative, it is unlikely the financially strapped state and local governments will be able to make up the difference. In this regard, the National League of Cities has written: "Local governments are already hard-pressed to deliver much needed services, and they are especially vulnerable to the impact of budget cuts in social service programs. Without the financial support from the federal government, it will be impossible for cities to satisfy this provision of H.R. 7; thus leaving cities vulnerable to litigation."[53]

The other key religious protections included in the bill – the requirement that government funds may not be used for "sectarian instruction, worship, or proselytization," and the requirement that if the religious organization offers such activity, it is to be "voluntary" and "offered separate" from the government funded program – are largely left to self enforcement.[54] Of course, we do not question the good faith of our non-profit or religious organizations, but it does seem that the Majority could offer stronger safeguards for this core constitutional concern than self certifications and self audits.

Particularly questionable is whether a sectarian religious program offered in conjunction with a covered federal program, such as after school programs for young children, can ever be truly "voluntary" to the children involved. We all know the tremendous peer pressure impressionable children can be under, and they can hardly be expected to be aware of their statutory rights to object under H.R. 7, let alone willing to assert such legal rights against a religious organization.[55] A similar concern exists for other categories of beneficiaries, such as drug addicts. As the Association for Addiction Professionals testified before the Senate Judiciary Committee, "[t]he patient presenting for addiction treatment is very vulnerable to subtle and implied coercion. As other treatment options may not exist in real time, the presenting patient may comply [with the religious coercion] in order to continue to receive services."[56]

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[53]Letter from Donald J. Borut, Exec. Dir., Nat'l League of Cities to Hon. John Conyers, Jr., p.2 (June 27, 2001) (on file with the House Judiciary Committee).

[54]It is worth noting that the bill still does not contain the most obvious safeguard with regard to separation of church and state – a simple statement that a religious organization may not proselytize at the same time and place as a government funded programs.

[55] "The bill would leave it up to the children in an after school program to ask for a non-religious alternative. But experience with a 'voluntary' school prayer demonstrates that peer pressure or other factors may hinder children from exercising that right." *See Mr. Bush's "Faith Based" Agenda*, N. Y. TIMES, July 8, 2001, at A10.

[56] Statement by John L. Avery, Government Relations Director of The Association for Addiction Professionals (NAADAC) before the Committee on the Judiciary, U.S. Senate June 6, 2001

The bill's other purported protection -- the specification that religious organizations receiving grants may not discriminate against beneficiaries on the basis of their religion – is also likely to be problematic in practice. One obvious problem is that this protection is limited to religious discrimination; it offers no protection against discrimination on account of sex, pregnancy status, marital status, or sexual orientation.[57] The fact that the legislation includes a savings clause stating that specified civil rights protections are unaffected by the bill is of little import, since none of the cited laws provide any protection with regard to these categories of beneficiaries.[58]

Even the protection against religious discrimination against beneficiaries is incomplete with regard to indirect aid. The original version of the legislation required that for indirect forms of disbursement religious organization were prohibited from discriminating based on religion in all respects.[59] The manager's amendment weakened the protection to merely require that a religious organization cannot deny admission based on religion.[60] This means, for example, pressure to convert can be applied once admission is granted. Also, the protections that proselytization must be voluntary and separately offered do not apply to indirect aid. Finally, like the other religious safeguards

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[57] Reps. Frank and Baldwin attempted to offer an amendment to prevent discrimination "on any basis prohibited under applicable federal, state, or local laws," including sexual orientation.

[58] Letter from Laura W. Murphy, Director, ACLU and Terri Schroeder, Legislative Representative, ACLU (June 27, 2001) at 11 (on file with the House Judiciary Committee) "At first glance, the paragraph may appear to provide significant protection to persons suffering employment discrimination caused by federally-funded religious organizations. However, a closer examination shows what protections are missing. Specifically, the paragraph saves absolutely no laws protecting persons against discrimination based on religion, sex, pregnancy status, marital status, or sexual orientation in any federally-funded program or activity."
Statement by Wade Henderson, *supra note* 36, at 5. "None of the cited laws provide any protection against employment discrimination based on religion, sex, pregnancy status, marital status, or sexual orientation."

[59] Manager's amendment to H.R. 7, Section 201 adding proposed Section 1994A(g)(2), 107th Cong. (2001). "A religious organization providing assistance through a voucher, certificate, or other form of indirect disbursement under a program described in subsection (c)(4) *shall not discriminate*, in carrying out the program, against an individual described in subsection (f)(3) on the basis of religion, a religious belief, or a refusal to hold a religious belief."

[60] Manager's amendment to H.R. 7, Section 201 adding proposed Section 1994A(h)(2), 107th Cong. (2001) provides, "A religious organization providing assistance through a voucher, certificate, or other form of indirect assistance under a program described in subsection (c)(4) *shall not deny an individual described in subsection (f)(3) admission into such program* on the basis of religion, a religious belief, or refusal to hold a religious belief."

applicable to beneficiaries, this anti-discrimination protection is not enforceable in court. In contrast to the provisions protecting religious organizations against discrimination, which are enforceable in court and allow recovery of attorney's fees,[61] beneficiaries facing discrimination are given no such right.

Entanglement

We are also concerned that by unleashing the process contemplated by H.R. 7, Congress will be inviting excessive entanglement between the church and state, particularly with regard to raw political calculations. The last several months have already unleashed a flurry of such activity, as the White House has used the full weight of its office to curry political support from impacted religious groups and elected representatives.

Perhaps the most telling instance of the dangers of such entanglement can be seen in the discussed *quid pro quo* between the Bush White House and the Salvation Army relating to H.R. 7.[62] On July 10, 2001, the *Washington Post*, citing the text of a confidential Salvation Army document, stated that the Salvation Army had received a "firm commitment" from the White House to issue a regulation protecting such charities from state and city laws and regulations against discrimination in employment on the basis of sexual orientation, or requiring domestic partner benefits.

The Salvation Army document states: "We suggested the amendment to OMB Circular #A-102 to staff at the White House Office of Faith-Based and Community Initiatives as one potential solution." The document goes on to say that White House officials "first want to move the charitable choice provisions in the legislation and use the political momentum of this effort to push forward religious exemptions to domestic partnership benefit ordinances and municipal contract clauses that protect against any form of sexual orientation discrimination." The document goes on to observe, "The Salvation Army's role will be a surprise to many in the media" and urges efforts to "minimize the possibility of any 'leak' to the media."

It is difficult to conceive of a more troubling fact pattern from the perspective of separation of church and state. We have a large religious organization – that receives more than $300 million in federal funds per year – allegedly entering into a secret deal by which the White House agrees to use taxpayer funds and resources to weaken civil rights laws if the religious organization supports the White House's legislative agenda.

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[61] The proposed section 1994A(n) authorizes the bringing of a civil action pursuant to title 43, section 1979 of the Revised Statutes of the United States, the codified version of what is commonly known as section 1983 of the United States Code. Title 42, Section 1988 allows for the awarding of attorney's fees in a 1979 action.

[62] *See infra* note 29.

Incidents such as this clearly raise the specter that religion may see its role as an independent voice of compassion in our society diminished. This was the very concern articulated by Rev. J. Brent Walker of the Baptist Joint Committee, when he stated, "[r]eligion has historically stood outside of government's control serving as a constant critic of government. Accepting government funding creates a dependency on government that will have the effect of silencing the prophetic witness. How can a religion raise a prophet's fist against government when it has the other hand open for a handout? It simply can't do both at the same time."[63]

An equally salient concern is that in the onslaught of lobbying for government grants by religious organizations, small and minority religions may be left underfunded and under appreciated. This of course would send a very dangerous message about which religions are worthy of government support and which are not. As Rabbi David Saperstein, the Director of the Religious Action Center of Reform Judaism testified: "The prospect of intense competition for limited funding; the politicizing of church affairs to obtain funds; the impact on those made to feel they are outsiders when they fail to obtain the funds – this leads to the very kind of sectarian competition and divisiveness that have plagued so many other nations and which we have been spared because of the separation of church and state."[64]

Early activities and statements by the Administration already provide cause for concern in this area. For example, when Stephen Goldsmith, a White House special adviser and a principal architect of the faith based plan, conducted a briefing in Augusta, Georgia in February, only "churches" were sent invitations.[65] Neither Jewish congregations nor secular nonprofits were invited. Similarly, when the White House hosted a meeting with Muslim groups last month, Muslim leaders walked out after an intern from David Bonior's office attending the meeting with the group was mistakenly removed by the Secret Service.[66]

Subsequently, on July 12, 2001, the *Washington Post* reported that senior White House officials, including Karl Rove, President Bush's senior advisor, were involved in discussions with the

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[63]Brent J. Walker, *What is Charitable Choice* Baptist Joint Committee Information Sheet on Charitable Choice, (Spring 2001). (On file with the House Judiciary Committee).

[64]Reform Action Center of Reform Judaism, "Rabbi Saperstein Testifies Before Congress in Opposition to Charitable Choice," Press Release (June 7, 2001).

[65]OMB Watch, "Analysis of Bush Administration's Charitable Choice Initiatives," p. 4 (Apr. 23, 2001).

[66]Caryle Murphy, *Muslim Leaders Leave White House Briefing; Removal of Intern Leads to Walkout*, WASHINGTON POST, June 29, 2001, at A35.

Salvation Army; contrary to the Bush Administration's earlier position that senior officials were not involved.

It is also noteworthy that in an interview on *Face the Nation*, when CBS correspondent Bob Schieffer asked Mr. Goldsmith whether the Nation of Islam, which runs successful inmate rehabilitation programs, would be eligible to apply for a grant under charitable choice, Mr. Goldsmith answered, "I would say, if [the Nation of Islam] preach[es] hate, if they can't perform the terms of the contract, they shouldn't be allowed to apply." Obviously, the last thing we want to do is put the Administration in a position of deciding which faiths are acceptable and which are not under their charitable choice plan. Yet when Rep. Scott offered an amendment to insure that discrimination between religions was not tolerated, and that any funding decisions were purely merit based, it was rejected by the Majority.

Voucher Expansion and Discrimination

Another serious concern with regard to the manager's amendment is that it provides an unprecedented new authorization of the use of vouchers and other indirect aid available for use by religious organizations. It also permits religious organizations to religiously discriminate in such voucherized programs, and to avoid the safeguards preventing the use of such funds for sectarian instruction, worship, or proselytization as well as the "voluntary and offered" separate requirement. These changes, effectuated in the fine print of the manager's amendment, and inserted without the benefit of any public hearings or discussion, constitute a massive expansion of the use of vouchers, and create major new loopholes in the bill's religious safeguards.

The authorization of the new voucher program appears in proposed new subsection (l). This language was not contained in the original version of H.R. 7, nor has it appeared in any previous charitable choice law. It would grant the Administration the ability to unilaterally convert more than $47 billion in social service programs into vouchers. Amazingly, this wholesale conversion in the nature of these programs could occur without any action by Congress, or even any regulatory action subject to outside comment. The action would even include education programs, despite the fact that such measures have created considerable legal and policy controversy in other contexts. In one fell swoop, this change could dramatically alter the nature of the nation's efforts to fight hunger, homelessness, crime, juvenile delinquency, and job training in a manner never contemplated or considered by Congress. At a minimum, such a wholesale change deserves more consideration than comes from being added in the middle of the night to a manager's amendment primarily touted for its other changes.

Our concerns with the new voucher program extend beyond its authorization. Tucked away in the manager's amendment is another clause which permits religious organizations participating in these "voucherized" programs to discriminate against beneficiaries on account of their religion. This is because, as noted above, subsection (h) of the Committee-reported version of the bill deletes language from the original bill generally prohibiting religious discrimination against beneficiaries by religious

organizations, and instead, merely states they "shall not deny ... admission" on the basis of religion. Again, this language did not appear in the original version of H.R. 7 or any other charitable choice law.

This means that religious groups could use their social service programs in an effort to convert non-believers to their faith. Given the controversy which ensued when the "Teen Challenge" group admitted in a recent congressional hearing that they seek to convert Jewish persons in their programs to make them "completed Jews," we are surprised that language allowing such proselytization in these "voucherized programs" would be added to the manager's amendment.

Equally objectionable is the fact that such proselytization could occur with federal funds provided under the bill. This is because, as noted earlier, the bill's safeguards do not apply to "voucherized programs." A careful reading of subsection (j) indicates that the bill's prohibitions on sectarian instruction, worship, or proselytization with federal funds and the requirement that any religious activity be "voluntary" and "offered separate" only applies with programs receiving direct federal funds, not indirect aid.

Constitutional Concerns

We also continue to be concerned that the Judiciary-reported version of the bill may be found unconstitutional. Contrary to the Majority's assertions, we need to do far more than consider whether the legislation is "neutral," as emphasized by the plurality opinion in *Mitchell v. Helms*.[67] The critical opinion was the concurring opinion written by Justice O'Connor and joined by Justice Breyer which represents the balance of power on the Court in terms of establishment clause doctrine.[68]

A reading of Justice O'Connor's concurrence makes clear that she specifically rejected the plurality's single-minded and exclusive focus on neutrality and disputed the plurality's contention that direct government aid to a pervasively sectarian institution is constitutionally acceptable: "we have never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid ... I also disagree with the plurality's conclusion that

[67]*Mitchell v. Helms*, 530 US 793, 809 (2000).

[68]The Justices in *Mitchell v. Helms*, 530 US 793 (2000) joined in three different opinions. Justice Thomas wrote the plurality opinion, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. *Id.* at 801. Justice Souter, joined by Justices Stevens and Ginsburg, wrote a dissent. *Id.* at 868. Justice O'Connor, joined by Justice Breyer, wrote the determinative opinion in the case and the one that provides the most authoritative guidance on the current meaning of the establishment clause. *Id.* at 836.

actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."[69]

In Justice O'Connor's view, a statute raises sensitive establishment clause concerns when it involves direct funding of religion, as H.R. 7 clearly does: "In terms of public perception, a government program of direct aid to religious schools based on number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. . . This Court has recognized special Establishment Clause dangers where the government makes direct money grants to sectarian institutions."[70]

In cases such as this, Justice O'Connor will look at a range of factors, including, notably, the constitutional safeguards present, and the degree of entanglement between government and religion. In Justice O'Connor's own words, "the program [should] include adequate safeguards"[71] and the funds should not "create an excessive entanglement between government and religion."[72]

Under these tests, there is a very real concern that H.R. 7 would fail to pass constitutional muster. As previously noted, the bill's so-called "safeguards" include numerous loopholes and are largely left to the religious organization to enforce. This is in stark contrast to the safeguards included in the school aid program upheld in *Mitchell*, where the state was given the power to cut off aid upon any violation, and conducted numerous monitoring visits and random reviews of the religious school to insure compliance. Also, as noted above, significant government entanglement with religion is not only inevitable, it has already begun to occur. We are also gravely concerned about the bill's new voucher provisions. The most serious problem is that these provisions allow pervasively sectarian organizations to use federal money for sectarian purposes, including attempting to convert beneficiaries. Even if the funding is provided indirectly, it seems likely that any bill allowing religious organizations to proselytize in federally funded programs would be suspect. Collectively, these infirmities raise serious constitutional problems with regard to H.R. 7.

III H.R. 7 Does not Authorize a Single Additional Dollar to Fund a Covered Social Welfare Program

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[69] *Mitchell v. Helms*, 530 US 793, 840 (O'Connor, J., concurring).

[70] *Id.* at 842, 843. Even Justice Thomas, writing for the four justice plurality admitted that: "Of course, we have seen 'special Establishment Clause dangers', when money is given to religious schools or entities directly rather than . . . indirectly. But direct payments of money are not at issue in this case . . . . " (*citations omitted*), 530 U.S. at 818-819 (Thomas, J., plurality opinion).

[71] *Id.* at 867.

[72] *Id.* at 845.

It is difficult to support legislation which purports to provide an enhanced ability to fight poverty when the legislation itself does not authorize a single dollar in additional funds for charitable choice programs. This fact, when combined with the severe cuts in the Administration's budget for social services will place severe constraints on the ultimate viability of charitable choice programs.

It is indeed ironic that at the same time the Administration is touting the benefit of making the various programs set forth in H.R. 7 eligible for charitable choice, it has elected to slash the budgets of those very programs.[73] For example, with regard to local crime prevention, the Bush budget cuts funds by $1 billion. This includes cutting funds for juvenile delinquency programs, such as gang-free schools and communities, incentive grants for local delinquency prevention, drug reduction program, and victims of child abuse.

The Bush budget treats public housing needs – also covered by H.R. 7 -- no better, cutting funds by more than $1 billion. This includes the termination of the $309 million Public Housing Drug Elimination Grant, and cutting the Public Housing Capital Fund by $700 million. The Public Housing Drug Elimination Grant Program is used for anti-crime and anti-drug law enforcement and security activities in public housing. The Public Housing Capital Fund provides critical building repairs in public housing.

Job training is cut by more than $500 million under the Administration's budget. This will translate into vastly reduced job training through the Workforce Investment Act for low income workers, dislocated workers, and other unemployed or underemployed individuals. The Older Americans Act -- also covered by H.R. 7 -- which provides funds for elderly nutrition programs, home care, and ombudsman services for residents of long-term care facilities would also be cut by more than $5 million under the Bush budget.

We shouldn't be surprised that the Administration's budget treats the programs covered under H.R. 7 so uncharitably, when it also cuts the programs subject to previously enacted charitable choice laws. For example, with regard to Temporary Assistance for Needy Families (TANF), the subject of the 1996 Welfare legislation, the Bush budget eliminates $319 million in supplemental grants as well as $2 billion in contingency fund grants. The Administration would also reduce the Community Development Block Grant program, the subject of the Community Services Block Grant law, by more than $500 million.

IV H.R. 7 unjustifiably protects business entities from negligent acts and unnecessarily preempts traditional state law

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[73]Staff of House Comm. On The Budget, 107th Cong., Bush Budget Cuts Priority Programs (April 30, 2001) (on file with House Judiciary Committee); Materials provided by Senate Budget Committee (on file with House Judiciary Committee).

Finally, we object to the liability provisions included in Sec. 104 of the bill. First, they were included without the benefit of support from a single witness, or any statement of justification or support. The provisions were so sloppily and hastily pasted together, that the original bill, and the manager's amendment, included provisions bearing no relationship whatsoever to non-profits.[74] The final version still contains very tenuous liability relief – for example, the exemption applies to the use of facilities and motor vehicles or aircrafts, regardless of whether a nonprofit pays for its use.[75]

We are also concerned that under the bill even if donated equipment injures or kills, the corporation would be absolved of any duty it currently owes to the charity that received the items and to the injured person who suffered because of the business's negligent act. Despite the fact that the corporations are in the best position to determine if the donated equipment is properly maintained and reasonably safe, this bill shifts the costs away from the corporation and onto the charity. If the charity is also shielded from liability, under state law, or if it is without sufficient financial resources, the injured person would have to shoulder the loss completely.

To the extent there is any problem with corporate liability for charitable in-kind donations, we would suggest that the states are fully capable of passing their own laws protecting volunteers from personal civil liability. Moreover, by mandating these provisions on the states, we may invite legal challenges to Congressional authority to legislate in this area, particularly under the Supreme Court's decision in *United States v. Lopez* and its progeny.[76]

Proponents' arguments that the legislation protects state prerogatives because it allows the states to opt-out[77] miss the mark. It is an odd formulation of federalism which grants all power to Congress unless the states affirmatively act to protect their interests. As proponents well know, it is no easy feat to obtain approval in a state house and senate and obtain the governor's signature.

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[74]Section 104(B)(4) of H.R. 7, as introduced, and the manager's amendment exempted business entities from civil liability relating to any injury to or death of an individual occurring at a facility of the business entity, if the injury or death occurred during a tour of the facility in an area of the facility that was not otherwise accessible to the public.

[75]H.R. 7 Sections 104(B)(2) and 104(B)(3), 107th Cong. (2001).

[76]514 S.Ct. 549 (1995). In *Lopez*, The Court held that the Gun-Free School Zones Act of 1990, which made illegal the knowing possession of a gun in a school zone, was beyond Congress' Commerce Clause authority. Congress acted to remedy the constitutional infirmity in the Gun-Free School Zones law by limiting it to firearms that "ha[ve] moved in or that otherwise affects interstate or foreign commerce." *See* 18 U.S.C. § 922q.

[77] Manager's amendment to H.R. 7, Section 104(e), 107th Cong. (2001).

Moreover, many states meet on a biennial basis and could not even consider electing to opt-out for several years.

Conclusion

We believe that the government does nothing to respond to America's social problems by sanctioning government-funded discrimination. We also do nothing to strengthen our religious freedoms by breaking down the separation between church and state.

Rather than propose legislation which opens up even greater divisions in our society, as H.R. 7 does, we urge the Administration and the Majority to work with us in a bipartisan basis in expanding the role of religion in a manner which protects both equal protection and freedom of religion.

John Conyers, Jr.
Barney Frank
Jerrold Nadler
Robert C. Scott
Melvin L. Watt
Zoe Lofgren
Sheila Jackson Lee
Maxine Waters
William D. Delahunt
Robert Wexler
Tammy Bladwin
Adam B. Schiff